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No. 269

IN THE

Supreme Court of the United States

October Term, 1964

On Appeal from the Supreme Court of the State of Ohio

KENNETH AGEE,

Appellant,

v.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS

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No. 259

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KENNETH AGEE,

Appellant,

v.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS

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BRIEF OPPOSING MOTION TO DISMISS

There was but one court of the State in which this cause was cognizable, the Supreme Court of the State of Ohio; in that Court, the questions presented were raised and considered but were decided contrary to the demands of the provisions of the Constitution of the United States expounded and relied upon.

The four questions presented were raised properly, adequately and in timely fashion in the proceedings in the Supreme Court of the State of Ohio. While, to show ample presentation of the appellant's contentions in this controversy the said Panel of three Commissioners and the said Board of Commissioners on Grievances and Discipline were treated as courts of the State of Ohio in the Jurisdictional Statement herein, actually they are not courts of the State. Sections 1 and 15 of Article IV of the Constitution of the State of Ohio provide that the courts of the State of Ohio are those created by that document and those created by the Legislature of the State of Ohio.

A disciplinary proceeding may only become a matter cognizable by a court of the State of Ohio in the event that the Board of Commissioners should determine that the discipline to be imposed is to be that of public reprimand, indefinite suspension from the practice of law, or disbarment. In such event, the disciplinary proceeding becomes cognizable in but one court of the State of Ohio, the Supreme Court of the State of Ohio, upon a "final certified report of such proceedings, including its findings of fact and recommendations," the transcript of the testimony and a statement of expenses. (Section 15 of Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio). Thereafter, under Section 17 of said Rule XXVII, the party being subjected to discipline has a single opportunity to state his contentions, his defer

in a court of the State of Ohio. This statement or pleading is described as, "Objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report upon which said order to show cause was issued." Said Section 17 directs that the grounds of objections be set forth therein and that there be filed also a brief in support of such objections, proof of service and copies in sufficient number. In final analysis, when resort is had to the pleading described to show that the questions presented were raised properly, in timely fashion, and adequately, claims based on such decisions as those cited by appellee in its Motion to Dismiss are not at all in point. The decision, review of which is sought, rejected the respondent's assertion of unconstitutionality in the proceedings in question by stating in a *per curiam* opinion that constitutionality of the first two of the questions presented herein had been decided in *Mahoning County Bar Association* v. *Franko*, (1958) 168 O. S. 17, in which the decision was rested on *Cleveland Bar Association* v. *Pleasant*, 167 O. S. 325, which held at page 334,

> "* * * the disciplining of those who have been admitted to the practice are matters which come within the inherent powers of the judicial branch of the government, and that, although this court recognizes that the legislative branch may by statute provide standards and qualifications for admission to the bar and methods for the initiation and conduct of proceedings to disbar, suspend, or otherwise discipline attorneys for specified causes, such legislation is to be interpreted as an aid to and not as a limitation on the power of the judicial branch in these respects."

Thereby it is made clear that appellant's assertion that the disciplinary proceedings under Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio have been made to supersede the provisions of law

contained in Sections 4705.02 and 4705.03 of the Revised Code of the State of Ohio is valid and is, moreover, sustained by the appellee's contention. Questions 1 and 2 of the questions presented by the Jurisdictional Statement herein are brought up squarely before the Supreme Court of the United States for consideration as to whether the review sought should be granted. But for the decision as to the constitutionality of said Rule XXVII, as stated in *Cleveland Bar Association v. Pleasant, supra*, the matters set forth in the third and fourth of the questions so presented could not have occurred, so that they, too, have been brought up squarely for consideration. Appelee's claims that the questions presented were inadequately or improperly raised in the courts of the State of Ohio are without application to the facts of the case at bar.

Appellee's contentions reveal that the questions presented are, indeed, substantial.

At pages 6 and 7 of the Motion to Dismiss herein, appellee has contended that the comparison of *Schware* v. *Board of Law Examiners*, 353 U. S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752, is not understood. *Schware* held that admission to the practice of law could not be denied, except for guilt of moral turpitude, lack of proficiency in the law, or other valid reasons. By this contention, appellee discloses an odd notion that the Canons of Professional Ethics provide not so much standards of conduct as snares, hence the language,

> "• • • and consequently a violation of the canons will *justify* a disciplinary proceeding regardless of whether that violation involved moral turpitude." (emphasis mine)

Of course a violation will justify a disciplinary proceeding, but where there is a bare violation of a Canon of Professional Ethics as distinguished from a violation, or other

conduct, involving moral turpitude, a difference can, and should be made in the severity of the discipline imposed. In *Schware*, itself, and in *Konigsberg* v. *State Bar of California*, 353 U. S. 252, this Court felt otherwise, that admission to the practice of law and disbarment, or indefinite suspension from the practice of law, are comparable in that, in either case, there must be valid reasons for the action taken. *In re Schlesinger*, 404 Pa. 584, 172 A2d 835, July 18, 1961, Charles Alvin Jones, Chief Justice of the Supreme Court of Pennsylvania, four Justices concurring, thought the two situations were at least comparable, and is so doing, used the words, at p. 843,

> "Since the requirements of due process prohibit a State from denying an applicant the opportunity to qualify for the practice of law because of membership in the Communist Party, *a fortiori*, should the requirequirements of due process prohibit a State from disbarring an attorney because of his membership in the Communist Party particularly when limited to a time during which the Party was a legally recognized political party in the State."

Clearly there must be valid reasons for disciplinary proceedings, and the severity of the discipline imposed must bear a rational relation to the offense. The Canons may not be corrupted from their purpose and thereby used as a snare.

The Motion to Dismiss reveals another odd notion that, citing an early statute of the State of Ohio, the causes for the discipline of an attorney at law are more a tool or a weapon than, in the statutes, grounds for disciplinary proceedings. Thus appellee has made its contention in the following words at the final sentence at page 5 of said Motion,

> "• • • an attorney *could* be disbarred *with* the following causes: • • •" (emphasis mine)

The statutes have used the expression, "*for* misconduct or unprofessional conduct in office involving moral turpitude, or *for* conviction of a crime involving moral turpitude." (emphasis mine)

Finally, comparison is made of the appellant herein to the situation presented by *Cohen* v. *Hurley*, 366 U. S. 117, 6 L. Ed. 2d 156, 81 S. Ct. 954, at page 10 of the Motion to Dismiss on the question of whether there is a person aggrieved, which is really merely, again, a question of severity of discipline. In *Cohen* v. *Hurley*, a rule of the Second Department of the State of New York required that contingent fee agreements and statements of how an attorney at law who files five or more of them in any year came to be retained must be filed. The accused, Cohen, refused to produce his records on inquiry by the judge concerned and thereby raised a question of his right to avail himself of the privilege against self-incrimination. While there can be no disagreement with investigation of the conduct of attorneys at law by the organized Bar, *Cohen* v. *Hurley* proceeded upon the accused's refusal to reveal, as required by rule of court, just what his suspect operations had been. For that refusal he was severly disciplined. In the judgment, review of which is sought, the appellant concealed nothing, and the gravamen of the offense relied upon was not, under the law of the State of Ohio, at the times on which the complaints are based, defined at all as an offense.